A

AMBANK BHD

v.

CHIDAMBARA NATHAN MST MUTHUSAMY & ANOR

B

COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: B-02-1389-2010]

C

11 SEPTEMBER 2013

LAND LAW: *Charge - Order for sale - Opposition to - Whether validity of charge challenged - Whether Form 16D notice challenged - Whether allegation of breach of agreement sufficient to defeat ad rem rights*

D

of charge - Whether cause to contrary warranting refusal of order for sale established - National Land Code, s. 256 & 256(3)

The appellant, Ambank Berhad, had granted to the first respondent and another ('the borrowers') a term loan and a flexi

E

loan totalling RM750,000. The respondents, the registered owners of the property in question and who each held a half share in the property, charged the property as security for the loans. The borrowers defaulted on the facilities resulting in subsequent filing of an application, for an order for sale by public auction of the

F

charged property by the appellant. The respondents opposed the application on the ground that there was cause to the contrary. The learned Judicial Commissioner decided in favour of the respondents and dismissed the appellant's application. Hence, this appeal. The second respondent contended that pursuant to a

G

negotiation with the appellant to settle the debt, the respondents entered into a sale and purchase agreement to sell the charged property for RM500,000. The second respondent stated that the appellant did not honour the agreement and had later issued a redemption statement where the redemption sum was raised to

H

RM550,000 which made it difficult for him to repay the loan. The second respondent also alleged that the appellant's breach of the purported agreement by refusing to allow the sale to a third party and thereby saving the property from being auctioned off constituted an act which was inequitable and was thus cause to

I

the contrary. The appellant, however, submitted that the allegation that there was an agreement between the appellant and the

respondents to allow the redemption of the charged property at RM500,000 was not supported by any evidence and therefore, remained a mere allegation.

Held (allowing appeal with costs against second respondent) Per Aziah Ali JCA delivering the judgment of the court:

(1) A duly registered charge under the National Land Code ('NLC') only creates a legal interest in the land. A chargee may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the NLC. It is settled law that an application for an order for sale under s. 256 is the exercise of a statutory remedy by a chargee against a chargor in default. It is not an action on a covenant. The court is under a duty to make an order for sale under s. 256 unless there is shown 'cause to the contrary' within s. 256(3) of the NLC. (paras 14 & 15)

(2) A statutory demand in Form 16D is a condition precedent to the exercise of the court's power under s. 256 of the NLC. However, a miscalculation by the chargee on the interest due in the Form 16D notice does not invalidate the notice. A variation of the rate of interest by the chargee without giving any notice of the same to the chargor would not amount to cause to the contrary. On the facts, the validity of the charge, the statutory procedural requirements and Form 16D notice were not challenged and thus, the amount due and payable as stated in the Form 16D was non-issue. (paras 17 & 20)

(3) A chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. However, the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s. 256(3) of the NLC. (para 18)

(4) The respondents' allegation of breach of agreement by the appellant, even if true, might give rise to an independent action *in personam* but was insufficient *per se* to defeat the *ad rem* rights of the appellant to an order for sale under its registered charge. The respondents had failed to show any rule of the common law or doctrine of equity operating in the respondents' favour and against which an order for sale would militate. (para 21)

(5) The respondents also had failed to show that its case came within the three categories of cause to the contrary established in *Low Lee Lian v. Ban Hin Lee Bank Bhd* and had failed to show the cause to the contrary that warranted the refusal of the order for sale. (para 21)

(6) The evidence showed that the end-financing for the purchase of the charged property had been secured by the second respondent and a third party and that the differential sum between the purchase price and the loan sum had been fully settled by the purchasers. However, there was no evidence that the respondents had attempted to or tendered any payment to the appellant. In the circumstances, the respondents had no basis to complain about the appellant's purported inequitable conduct when they themselves did not display *uberrimae fides*. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, Ambank Bhd, telah memberikan kepada responden pertama dan seorang lagi ('peminjam-peminjam') pinjaman berjangka dan pinjaman mudah berjumlah RM750,000. Responden-responden, pemilik-pemilik berdaftar hartanah yang dipersoalkan dan yang mana masing-masing memegang separuh bahagian dalam hartanah tersebut, menggadaikan hartanah tersebut sebagai cagaran untuk pinjaman-pinjaman tersebut. Peminjam-peminjam gagal membayar pinjaman tersebut yang kemudiannya menjurus kepada pemfailan permohonan bagi perintah jualan hartanah yang digadaikan secara lelongan awam oleh perayu. Responden-responden membantah permohonan tersebut atas alasan bahawa terdapat sebab bertentangan. Yang Arif Pesuruhjaya Kehakiman memutuskan memihak kepada responden-responden dan menolak permohonan perayu. Maka, rayuan ini. Responden kedua menghujahkan bahawa berikutan perbincangan dengan perayu untuk menyelesaikan hutang tersebut, responden-responden memasuki perjanjian jual beli untuk menjual hartanah yang digadaikan pada harga RM500,000. Responden kedua menyatakan bahawa perayu tidak menepati perjanjian tersebut dan kemudiannya mengeluarkan penyata penebusan di mana jumlah penebusan dinaikkan kepada RM550,000 yang menjadikannya lebih sukar untuknya membayar balik pinjaman tersebut. Responden kedua juga menyatakan bahawa kemungkiran perjanjian oleh perayu dengan tidak membenarkan jualan kepada pihak ketiga dan dengan itu menyelamatkan hartanah tersebut daripada dilelong membentuk tindakan yang tidak berekuiti dan oleh itu adalah sebab

bertentangan. Perayu, walau bagaimanapun, menghujahkan bahawa dakwaan bahawa terdapat perjanjian antara perayu dan responden-responden untuk membenarkan penebusan hartanah yang digadaikan pada harga RM500,000 tidak disokong oleh apa-apa keterangan dan dengan itu kekal sebagai dakwaan semata-mata.

Diputuskan (menolak rayuan dengan kos terhadap responden kedua)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Gadaian yang telah didaftarkan di bawah Kanun Tanah Negara ('KTN') hanya membentuk kepentingan dari segi undang-undang dalam tanah. Pemegang gadaian boleh melaksanakan gadaian statutorinya terhadap penggadai dengan cara prosiding *in rem* di bawah s. 256 KTN. Adalah undang-undang matan bahawa suatu permohonan untuk perintah jualan di bawah s. 256 adalah pelaksanaan remedi statutori oleh pemegang gadaian terhadap penggadai yang bersalah. Ia bukan tindakan terhadap perjanjian. Mahkamah bertanggungjawab untuk memberikan perintah jualan di bawah s. 256 kecuali 'sebab bertentangan' dalam s. 256(3) KTN dibuktikan.

(2) Tuntutan statutori dalam Borang 16D adalah syarat dahuluan kepada pelaksanaan kuasa mahkamah di bawah s. 256 KTN. Walau bagaimanapun, kesalahan pengiraan faedah tertunggak dalam Borang 16D oleh pemegang gadaian tidak membatalkan notis tersebut. Perbezaan kadar faedah oleh pemegang gadaian tanpa memberikan apa-apa notis kepada penggadai tidak membentuk sebab bertentangan. Berdasarkan fakta, kesahan gadaian, keperluan prosedur statutori dan Borang 16D tidak dicabar dan dengan itu, jumlah tertunggak dan perlu dibayar seperti yang dinyatakan dalam Borang 16D tidak menjadi isu.

(3) Penggadai boleh mematahkan sesuatu permohonan untuk perintah jualan dengan menunjukkan bahawa pemberiannya adalah bertentangan dengan peruntukan undang-undang atau ekuiti yang tertentu. Walau bagaimanapun, penggadai sepatutnya boleh menunjukkan arahan statutori atau undang-undang *common law* atau doktrin ekuiti yang berfungsi memihak kepadanya yang menghalang perintah jualan. Apa-apa yang tidak mencapai keperluan ini adalah bermaksud sebab bertentangan di bawah s. 256(3) KTN.

(4) Dakwaan responden-responden mengenai kemungkiran perjanjian oleh perayu, walaupun benar, boleh menjurus kepada tindakan tersendiri *in personam* tetapi dengan sendirinya tidak mencukupi untuk mematahkan hak *in rem* perayu kepada perintah jualan di bawah gadaian berdaftarnya. Responden-responden telah gagal menunjukkan apa-apa undang-undang *common law* atau doktrin ekuiti yang berfungsi memihak kepada responden-responden dan yang mana akan menghalang perintah jualan.

(5) Responden-responden juga telah gagal menunjukkan bahawa kesnya terangkum dalam tiga kategori sebab bertentangan seperti yang diputuskan dalam kes *Low Lee Lian v. Ban Hin Lee Bank Bhd* dan telah gagal menunjukkan sebab bertentangan yang mewajarkan penolakan perintah jualan.

(6) Keterangan menunjukkan bahawa pembiayaan akhir untuk pembelian hartanah yang digadai tersebut telah dijamin oleh responden kedua dan pihak ketiga dan bahawa jumlah perbezaan antara harga belian dan jumlah pinjaman telah diselesaikan sepenuhnya oleh pembeli-pembeli. Walau bagaimanapun, tidak ada keterangan bahawa responden-responden telah mencuba atau memberikan apa-apa bayaran kepada perayu. Dalam keadaan tersebut, responden-responden tidak mempunyai asas untuk mengadu mengenai tindakan perayu yang tidak berekuiti apabila mereka sendiri tidak menunjukkan *uberrimae fides*.

Case(s) referred to:

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 CA ***(refd)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn Bhd [1978] 1 LNS 63 FC ***(refd)***

Hongkew Holdings (M) Sdn Bhd v. Hyundai Heavy Industries Co Ltd [2007] 5 CLJ 165 CA ***(refd)***

Keng Soon Finance Bhd v. Retnam Holdings Sdn Bhd & Anor [1998] 1 MLJ 457 ***(refd)***

Lori Malaysia Berhad (Interim Receiver) v. Arab Malaysia Finance Berhad [1993] 3 AMR 3161 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***

Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193 SC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Visvanathan Perumal & Ors v. Mona Industries Malaysia Sdn Bhd & Anor [2004] 1 LNS 35 HC ***(refd)***
Wong Kim Fatt v. Yong Kwet Yin [1996] 1 BLJ 444 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 256(2), (3), 257

For the appellant - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina
For the 1st respondent - Shamsol Zakri Zakaria; SFC
For the 2nd respondent - Nora Hayati Ismayatim; M/s Gunaseelan & Assocs

[Appeal from High Court, Shah Alam; Originating Summons No: MT6(1)-24-579-2007]

Reported by S Barathi

JUDGMENT

Aziah Ali JCA:

[1] The appellant, Ambank Bhd had granted to the first respondent and another individual by the name of Manoharan Valu ("the borrowers") a term loan and a flexi loan totaling RM750,000. The respondents are the registered owners of the property known as H.S.(D) 50443, P.T. No.11086 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan ("the charged property") which the respondents charged in favour of the appellant as security for the loans granted by the appellant to the borrowers. The respondents each held a half share in the charged property. The first respondent had been adjudged a bankrupt and learned Senior Federal Counsel who appeared for the Director-General of Insolvency informed this court that they would not be taking any stand on this matter.

[2] The borrowers defaulted on the facilities. Despite letters of demand being issued to the respondents no payment was made. On 27 February 2007 a Form 16D notice was issued. Form 16D showed that as at 31 December 2006 the sum of RM1,378,041.40 was owed to the appellant (pp. 223-225 appeal record). Since no payment was received from the respondents, the appellant filed the application for an order for sale by public auction of the charged property. The respondents opposed the application on the ground that there was cause to the contrary. The learned Judicial

A Commissioner decided in favour of the respondents and dismissed the appellant's application with costs to the second respondent. The appellant appealed against the decision. Having considered the appeal record and the submissions made, we allowed the appeal and set aside the decision of the High Court. We granted the
B application as prayed with costs of RM10,000 against the second respondent. No costs was ordered against the first respondent. We ordered that the matter be remitted to the High Court to make the necessary orders under s. 257 of the National Land Code ("NLC"). The deposit was refunded to the appellant. We
C now give our reasons below.

Salient Facts

[3] In opposing the application the second respondent through his affidavit in reply affirmed on 22 April 2008 averred that
D sometime in November 2003 he had negotiated with the appellant to settle the debt. Following that the respondents had entered into a sale and purchase agreement to sell the charged property for RM500,000. A letter dated 25 January 2005 written by the
E second respondent to the appellant was exhibited (p. 211 appeal record). The appellant did not respond to this letter. In the affidavit affirmed by one M Ramanathan S Meyyappan for the respondents, it was averred that the appellant's officers who were named in the said affidavit had agreed for the second respondent
F to sell the charged property and the second respondent and one Logeiswaran Muthusamy had entered into a sale and purchase agreement. The appellant's officers named in the affidavit of M Ramanathan S Meyyappan did not file any affidavit in reply. The second respondent stated that the appellant did not honour
G the agreement and one year later the appellant had issued a redemption statement and had raised the redemption sum to RM550,000. According to the second respondent the appellant had made it difficult for him to repay the loan to the appellant.

[4] The appellant through the affidavit affirmed by one Ferdaus
H Mohd Amin dated 6 June 2008 averred that the appellant and the respondents were negotiating the sale price and denied having agreed for the respondents to sell or transfer the charged property at RM500,000 as the price was too low. The appellant further averred that even if there was any such agreement as alleged, it
I would not amount to cause to the contrary. In para. 11 of the affidavit it was averred that the second respondent had not disputed:

(a) the receipt of the letter of demand dated 19 January 2007 issued by the appellant's solicitors;

(b) the basis of calculation and/or the amount of loan due together with overdue interest as stated in the said letter;

(c) the receipt of the Form 16D notice; and

(d) the basis of calculation and/or the amount of loan due together with overdue interest as stated in the said Form 16D.

Therefore the second respondent is deemed to have accepted and admitted the amount and the interest claimed as correct. In his affidavit in reply affirmed on 7 July 2008 the second respondent did not respond to the averments in para. 11 of the appellant's affidavit.

[5] The second respondent contended that the appellant's denial of any agreement with the respondents had no basis because no affidavit in reply to rebut or challenge Ramanathan's affidavit was filed by the two officers named in said affidavit. Therefore it was contended that the appellant's denial of any agreement between the appellant and the second respondent could not be accepted and the second respondent's averment that there was such an agreement between the appellant, the second respondent and Logeiswaran Muthusamy must be accepted. The second respondent alleged that the appellant's conduct was unfair and there was thus cause to the contrary. The respondents contended that the appellant's breach of the purported agreement by refusing to allow the sale to a third party and thereby saving the property from being auctioned off constituted an act which was inequitable.

The Appeal

[6] Learned counsel for the appellant submitted that the learned Judicial Commissioner had misdirected herself in law and in fact and that the respondents had failed to show cause to the contrary against the appellant's charge action. In essence learned counsel submitted that the allegation that there was an agreement between the appellant and the respondents to allow the redemption of the charged property at RM500,000 was not supported by any evidence and remained a mere allegation for the following reasons:

(a) the appellant had through its letter dated 4 January 2005 informed the respondents that the appellant was unable to

A agree to the respondents' request to discharge the third party charge for RM500,000 and counter proposed a discharge sum of RM668,742.75 (p. 209 appeal record);

(b) there was no agreement for the respondents to redeem the
B property at RM500,000. The meeting held between the appellant and the respondents was to allow parties to negotiate and the appellant had not consented or agreed for the respondents to redeem the charged property at RM500,000 as it was too low (pp. 44-45 appeal record).

C **[7]** It was submitted that the learned Judicial Commissioner had erred in accepting the respondents' allegation that the appellant had, at the meeting, agreed to allow the charged property to be redeemed at RM500,000 when no evidence was produced to support the allegation. The respondents had failed to produce a
D letter dated 20 November 2003 referred to by the second respondent in his letter to the appellant dated 25 January 2005 which purportedly showed that the appellant had agreed to allow the respondents to sell the charged property for RM500,000 (p. 211 appeal record). Thus the alleged agreement was merely a
E bare allegation.

[8] Learned counsel further submitted that had such an agreement been reached, the appellant would have issued a redemption statement. However the redemption statement was
F only issued on 4 January 2005 (pp. 209-210 appeal record) which was consequent to the respondent's solicitors' letter dated 17 September 2004. In that letter the solicitors had given an undertaking to forward, "upon receipt", the original redemption statement from the appellant addressed directly to the respondents
G (p. 207 appeal record). It was submitted that the letter was evidence that no agreement as alleged by the respondents had been reached at the said meeting.

[9] Referring to the respondents' solicitors' letter dated
H 17 September 2004, learned counsel submitted that this letter showed that the first respondent as vendor had sold his share in the charged property to the second respondent and Logeiswaran Muthusamy and the differential sum between the purchase price and the loan sum had been fully settled by the purchasers and
I that both the vendor and the purchasers had executed the memorandum of transfer (p. 206 appeal record). The second respondent *vide* his affidavit affirmed on 7 July 2008 had also

averred that he and Logieswaran had obtained end-financing from RHB Bank Bhd towards the purchase. This was also stated in the second respondent's letter dated 25 January 2005 (p. 211 appeal record). Learned counsel submitted that even if there was an agreement as alleged, the respondents themselves had failed to keep to their part of the bargain by failing to pay the sum of RM500,000. Therefore any agreement as alleged would have lapsed in view of the respondents' failure to tender any payment.

[10] With reference to the respondents' contention that the appellant had reneged on the alleged agreement learned counsel submitted that this was at best a breach of contract or an alleged fetter to the respondents' 'equity of redemption' which gives rise to a cause of action *in personam*. The respondents had the option of initiating a claim against the appellant *in personam* pertaining to the alleged breach. However it was submitted that 'equity of redemption' had no application to registered charges (*Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, SC). Further the appellant's charge action was not the proper forum to litigate this dispute. Learned counsel submitted that the learned Judicial Commissioner had failed to fully appreciate the evidence and had misdirected herself on the law as the alleged agreement would not have amounted to cause to the contrary.

[11] For the respondents it was submitted that the learned Judicial Commissioner was correct in holding that the failure by the appellant's officers to rebut the affidavit of M Ramanathan S Meyyappan was evidence that the appellant had allowed the second respondent to sell the property to reduce the sum owed and that it was inequitable to permit the appellant to foreclose the charged property when the appellant had permitted the second respondent to sell the said property. It was submitted that the appellant's denial that there was no agreement between the appellant and the second respondent could not be accepted because the appellant had failed to file any affidavit by the two officers who had met with the second respondent and Logeiswaran. The affidavit affirmed by Ferdaus Mohd Amin ought not to be accepted as he had no personal knowledge regarding the agreement (*Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn Bhd* [1978] 1 LNS 63; [1979] 2 MLJ 236; *Lori Malaysia Berhad (Interim Receiver) v. Arab Malaysia Finance Berhad* [1993] 3 AMR 3161; *Wong Kim Fatt v. Yong Kwet Yin* [1996] 1 BLJ 444; [1996]

A 1 MLJ 45). Learned counsel submitted that the failure by the appellant to reply to the second respondent's letter dated 25 January 2005 amounted to an acceptance of its contents (*Visvanathan Perumal & Ors v. Mona Industries Malaysia Sdn Bhd & Anor* [2004] 1 LNS 35; [2004] 2 AMR 710). Therefore the B denial by the appellant was baseless and the court ought to accept the averment by the second respondent that there was an agreement between the appellant and the second respondent (*Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281). Learned counsel submitted that the C appellant's breach of the agreement to permit the purchase of the charged property by the second respondent and Logeiswaran thereby saving the said property from being auctioned off constituted an act which was 'inequitable' (*Keng Soon Finance Bhd v. Retnam Holdings Sdn Bhd & Anor* [1998] 1 MLJ 457). The D appellant therefore ought not to be allowed to take advantage of its own wrong and it was inequitable to permit the appellant to foreclose the charged property.

[12] The provisions of the NLC relevant to the present appeal E are s. 256(2) and (3) which state as follows:

> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> F
>
> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[13] There are numerous decisions by this court and the Federal G Court on s. 256 of the NLC (see *Hongkew Holdings (M) Sdn Bhd v. Hyundai Heavy Industries Co Ltd* [2007] 5 CLJ 165, CA; *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd* [1988] 1 CLJ 8; [1988] 1 CLJ (Rep) 193; *Low Lee Lian v. Ban Hin Lee Bank Bhd* (*supra*); *Chan Boi Loi v. Public Bank Bhd &* H *Another Application* [2009] 6 CLJ 81, FC; *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, CA; *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625). We take this opportunity to set out the principles which can be discerned from these decisions that are I relevant to this appeal.

[14] A duly registered charge under the NLC only creates a legal interest in the land. A chargee may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256. It is settled law that an application for an order for sale under s. 256 is the exercise of a statutory remedy by a chargee against a chargor in default. It is not an action on a covenant. It is trite that a chargee/creditor may pursue any or all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Absent any special circumstances, a chargee who has obtained an order for sale is not barred by *res judicata* or any other form of estoppel from pursuing actions *in personam* against the chargor or the surety. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan.

[15] The terms of s. 256 of the NLC are imperative. A court in the States of Malaya does not have a choice as to the type of order it may make when moved by a chargee under s. 256. There is only one order that it is permitted to make, namely, an order for sale. The court is under a duty to make an order for sale unless there is shown "cause to the contrary" within s. 256(3) of the NLC.

[16] Cause to the contrary may be established only in three categories of cases, namely:

(a) a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code;

(b) a chargor who is able to show that the chargee has failed to meet the conditions precedent for making of an application for order for sale;

(c) a chargor who is able to demonstrate that its grant would be contrary to some rule of law or equity.

[17] A statutory demand in Form 16D is a condition precedent to the exercise of the court's power under s. 256. There is a clear distinction between sums lawfully due and alleged arithmetical miscalculations. A miscalculation by the chargee on the interest due in the Form 16D notice does not invalidate the notice.

A variation of the rate of interest by the chargee without giving any notice of the same to the chargor would not amount to cause to the contrary. Where a chargee demands a greater sum which includes a varied rate of interest of which no notice is given despite a contractual provision to the contrary, that is nevertheless a lawful demand. And the chargor should, if he considers the amount demanded to be excessive, tender payment of the sum actually due. If the chargee refuses to accept the tender of a lesser sum then only does the Form 16D notice become unlawful. If this be not the case, errant borrowers would, by proving that the sum demanded in a Form 16D notice is excessive by a few ringgit, successfully resist an application for an order for sale and thereby escape the hand of justice.

[18] A chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. However the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s. 256(3) of the NLC. It would not be sufficient to allege mere breaches by the chargee of the loan agreement between the chargor and the borrower or even of the terms of the annexure to the charge in order to resist an application under s. 256(3). An allegation that the bank acted in breach of contract, while it might give rise to an independent action *in personam*, was insufficient *per se* to defeat the *ad rem* rights of the bank under its registered charge to an order for sale. Allegations that fail to amount to cause to the contrary may, nevertheless, form the basis of an action *in personam* against the chargee.

[19] A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the NLC. Next, he must ensure that the procedural requirements prescribed under the Rules of the High Court 1980 (as it was then) have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary. A judge who makes an order for sale merely finds that the facts

relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action *in personam* that may be brought by the chargor against the chargee.

[20] Reverting to the present appeal it is apparent that the respondents have not challenged the validity of the charge. Hence it was not in issue. The statutory procedural requirements were also not challenged. There was no issue raised against Form 16D notice. Therefore the amount due and payable as stated in the said Form 16D was not in issue either.

[21] The respondents' opposition to the application was grounded on the alleged breach of an agreement by the appellant. Applying the principles that we have set out above we find that the allegation, even if true, might give rise to an independent action *in personam* but was insufficient *per se* to defeat the *ad rem* rights of the appellant to an order for sale under its registered charge. We find that the respondents had failed to show any rule of the common law or doctrine of equity operating in the respondents' favour and against which an order for sale would militate. We find that the respondents had failed to show that its case came within the three categories of cause to the contrary as established in *Low Lee Lian*. We agreed with the appellant that the respondents had failed to show cause to the contrary that warrants the refusal of the order for sale. We were also of the view that the respondents had not come to court with clean hands. The evidence showed that end-financing for the purchase of the charged property had been secured by the second respondent and Logeiswaran and that the differential sum between the purchase price and the loan sum had been fully settled by the purchasers. However there was no evidence whatsoever that the respondents had attempted to or had tendered any payment to the appellant. In our considered view the respondents had no basis to complain about the appellant's purported inequitable conduct when they themselves did not display *uberrimae fides*. For the reasons stated above we allowed the appeal with costs against the second respondent.